Supreme Court, U.S.
FILED
MAY 20 1998
OFFICE OF THE CLERK

(2)

No. 97-1543

In the Supreme Court of the United States

OCTOBER TERM, 1997

GERALD B. LEFCOURT, P.C., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
LORETTA C. ARGRETT
Assistant Attorney General
CHARLES E. BROOKHART
JOHN A. DUDECK, JR.
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

16 pp

QUESTION PRESENTED

Whether the civil penalty for intentional disregard of the reporting requirements of Section 6050I of the Internal Revenue Code, 26 U.S.C. 6050I, was properly imposed in this case.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Caplin & Drysdale, Chartered v. *United States*, 491 U.S. 617 (1989)	9
Cheek v. *United States*, 498 U.S. 192 (1991)	9
Denbo v. *United States*, 988 F.2d 1029 (10th Cir. 1993)	10
Domanus v. *United States*, 961 F.2d 1323 (7th Cir. 1992)	10
Grand Jury Proceedings (Newton), In re, 899 F.2d 1039 (11th Cir. 1990)	5
Grand Jury Subpoena Duces Tecum Served Upon Gerald L. Shargel, In re, 742 F.2d 61 (2d Cir. 1984)	5
Grand Jury Subpoena Served Upon John Doe, Esq., In re, 781 F.2d 238 (2d Cir. 1986)	5
Grand Jury Subpoenas (Anderson), In re, 906 F.2d 1485 (10th Cir. 1990)	4-5, 6, 7
Grand Jury Subpoenas (Hirsch), In re, 803 F.2d 493 (9th Cir. 1986)	7
Hochstein v. *United States*, 900 F.2d 543 (2d Cir. 1990)	10
Hudson v. *United States*, 118 S. Ct. 488 (1997)	10, 11
Kennedy v. *Mendoza-Martinez*, 372 U.S. 144 (1963)	10

Cases—Continued: Page

Richey v. *Internal Revenue Service*, 9 F.3d 1407 (9th Cir. 1993) 10
Ryder, In re, 381 F.2d 713 (4th Cir. 1967) 7
Tornay v. *United States*, 840 F.2d 1424 (9th Cir. 1988) 4
United States v. *Blackman*, 72 F.3d 1418 (9th Cir. 1995), cert. denied, 117 S. Ct. 275 (1996) 5, 8, 9
United States v. *Garland*, 69 A.F.T.R.2d 1283 (N.D. Ga. 1992) 5
United States v. *Gertner*, 873 F. Supp. 729 (D. Mass.), aff'd, 65 F.3d 963 (1st Cir. 1995) 8
United States v. *Goldberger & Dubin, P.C.*, 935 F.2d 501 (2d Cir. 1991) 5, 7, 8, 9
United States v. *Leventhal*, 961 F.2d 936 (11th Cir. 1992) 5, 8, 9
United States v. *Monnat*, 853 F. Supp. 1301 (D. Kan. 1994) 9
United States v. *Ritchie*, 15 F.3d 592 (6th Cir.), cert. denied, 513 U.S. 868 (1994) 5, 7
United States v. *Sepenuk*, 864 F. Supp. 1002 (D. Ore. 1994) 5
United States v. *Sindel*, 53 F.3d 874 (8th Cir. 1995) 6, 8
Upjohn Co. v. *United States*, 449 U.S. 383 (1981) 6
Vingelli v. *U.S. Drug Enforcement Agency*, 992 F.2d 449 (2d Cir. 1993) 4, 7

Statutes and regulation:

Internal Revenue Code (26 U.S.C.):
§ 6050I 2
§ 6050I(b) 2
§ 6050I(b)(2) 4
§ 6721(e) 3, 9
26 C.F.R. 301.6721-1(f)(2)(ii) 9

Miscellaneous: Page

H.R. Conf. Rep. No. 841, 99th Cong., 2d Sess. Pt. 2 (1986) 10
H.R. Rep. No. 426, 99th Cong., 1st Sess. (1986) 10
3 J. Weinstein & M. Berger, *Weinstein's Federal Evidence* (J. McLaughlin ed., 2d ed. 1998) 6
S. Rep. No. 313, 99th Cong., 2d Sess. (1986)..... 10

In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1543

GERALD B. LEFCOURT, P.C., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 125 F.3d 79. The opinion of the district court (Pet. App. 22a-46a) is unreported.

JURISDICTION

The decision of the court of appeals was entered on September 10, 1997. The petition for rehearing and suggestion for rehearing en banc was denied on December 17, 1997. The petition for a writ of certiorari was filed on March 17, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Gerald B. Lefcourt, P.C., is a professional corporation that specializes in criminal defense work. During the summer of 1993, petitioner undertook the representation of a client who faced federal drug and money laundering charges. The client paid petitioner more than $10,000 in cash for legal services (Pet. App. 4a).

Under Section 6050I of the Internal Revenue Code, a person who receives more than $10,000 in cash in a business transaction is required to file a return (known as Form 8300) that identifies the payor, the amount of the cash payment and the nature of the transaction. 26 U.S.C. 6050I(b). On July 9, 1993, petitioner submitted a Form 8300 that notified the Internal Revenue Service of a cash payment for legal fees in excess of $10,000. Petitioner refused, however, to disclose the exact amount of the cash received, the name of the person from whom the cash was received and the name of the person for whom the services were provided.[1] Instead, petitioner attached to the Form 8300 an affidavit that asserted that the client identity and fee information called for by Section 6050I was protected from disclosure by the attorney client privilege, the Fifth and Sixth Amendments of the Constitution and the Lawyer's Code of Professional Responsibility (Pet. App. 4a, 25a-27a).

On December 14, 1993, the Internal Revenue Service served petitioner with a notice of proposed civil

---

[1] Between 1986 and 1992, petitioner filed several other Forms 8300 that similarly omitted information concerning the amount of cash received, the payor of the cash and the identity of the person on whose behalf the cash was provided (Pet. App. 25a-26a n.3).

penalties. Under Section 6721(e) of the Code, a civil penalty may be imposed against any taxpayer who intentionally disregards the reporting requirements of Section 6050I. 26 U.S.C. 6721(e). On August 8, 1994, the IRS assessed a penalty of $25,000 against petitioner under Section 6721(e). Petitioner paid the full amount of the penalty and brought this refund action in district court (Pet. App. 4a-5a, 28a-30a).

2. The district court granted summary judgment to the government. The court held that petitioner was liable for the $25,000 penalty under Section 6721(e) because it had intentionally disregarded the reporting requirements of Section 6050I. The court further concluded that, because petitioner had failed to establish that it acted with "reasonable cause," it was not entitled to a waiver of the penalty under Section 6724. The court rejected petitioner's contention that the identity of petitioner's client was protected from disclosure under the attorney client privilege and that compliance with the reporting requirements of Section 6050I should therefore be excused (Pet. App. 5a, 36a-45a).[2]

3. The court of appeals affirmed. The court agreed with the district court that the failure of petitioner to disclose the identity of the payor constituted willful and intentional disregard of the reporting obligations of Section 6050I. The court concluded that petitioner had not established "reasonable cause" to excuse intentional noncompliance with Section 6050I because petitioner's decision to withhold the information did

---

[2] After the district court decision was entered, petitioner filed an amended Form 8300 that provided the name of the client and the other information that previously had been omitted from the Form (Pet. 3; Pet. App. 5a).

not conform to the standard of care that a reasonably prudent person would use in the course of his trade or business. The court explained that a proper degree of care had not been exercised by petitioner because the case law squarely rejected the contention that the risk of client incrimination is a circumstance that justifies nondisclosure of the required information (Pet. App. 7a-21a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. The disclosure requirements of Section 6050I(a) of the Internal Revenue Code apply to attorneys and to all other persons engaged in business activities. The statute requires "[a]ny person (1) who is engaged in a trade or business, and (2) who, in the course of such trade or business, receives more than $10,000 in cash in 1 transaction (or 2 or more related transactions)" to file a return that discloses "(A) the name, address and [taxpayer identification number] of the person from whom the cash was received, (B) the amount of cash received, (C) the date and nature of the transaction, and (D) such other information as the Secretary may prescribe." 26 U.S.C. 6050I(b)(2).

It is well established that, in the absence of exceptional circumstances, the identity of a client and the amount of the fees paid by that client are not within the scope of the attorney client privilege. See *e.g.*, *Vingelli* v. *U.S. Drug Enforcement Agency*, 992 F.2d 449, 452 (2d Cir. 1993); *Tornay* v. *United States*, 840 F.2d 1424, 1426 (9th Cir. 1988); *In re Grand Jury Subpoenas (Anderson)*, 906 F.2d 1485, 1488 (10th Cir.

1990); *In re Grand Jury Proceedings (Newton)*, 899 F.2d 1039, 1044 (11th Cir. 1990). The reporting requirements of Section 6050I are thus not inconsistent with traditional attorney client privilege concerns. See, *e.g.*, *United States* v. *Goldberger & Dubin, P.C.*, 935 F.2d 501, 504-505 (2d Cir. 1991); *United States* v. *Blackman*, 72 F.3d 1418, 1425 (9th Cir. 1995), cert. denied, 117 S. Ct. 275 (1996); *United States* v. *Leventhal*, 961 F.2d 936, 940 (11th Cir. 1992). See also *United States* v. *Ritchie*, 15 F.3d 592, 602 (6th Cir.) (dictum), cert. denied, 513 U.S. 868 (1994).

Petitioner contended in the courts below, however, that there was a possibility that client identity and fee information could incriminate its client in an active criminal investigation and that this possibility constituted a "special circumstance" that warranted protection of the information from disclosure. The courts have consistently held, however, that client identity and fee information is not privileged even if it is conceivably incriminating (Pet. App. 12a-18a, citing *In re Grand Jury Subpoena Duces Tecum Served Upon Gerald L. Shargel*, 742 F.2d 61 (2d Cir. 1984), and *In re Grand Jury Subpoena Served Upon John Doe, Esq.*, 781 F.2d 238 (2d Cir. 1986)). Accord *United States* v. *Goldberger & Dubin*, 935 F.2d at 502, 505 (law firm with clients under criminal indictments not exempt from reporting requirements of Section 6050I); *United States* v. *Leventhal*, 961 F.2d at 938 & nn.4, 5 (same); *United States* v. *Sepenuk*, 864 F. Supp. 1002 (D. Ore. 1994) (rejecting contention that disclosures required by Form 8300 might lead to future incrimination of client); *United States* v. *Garland*, 69 A.F.T.R.2d 1283 (N.D. Ga. 1992) (same). See also notes 3-4, *infra*.

Courts have, however, described three narrow and overlapping "special circumstances" under which client identity and fee information may be protected by the attorney-client privilege—the "legal advice" exception, the "last-link" exception and the "confidential communication" exception. The "legal advice" exception protects client identity and fee information when there is a strong probability that disclosure would implicate the client in the very criminal activity for which legal advice was sought. The "last-link" exception protects the disclosure of a client's identity by an attorney when such information would incriminate the client by providing the last-link in an existing chain of evidence. The "confidential communication" exception prevents disclosure of the client's identity and fee information where the disclosure would be tantamount to disclosing an otherwise protected confidential communication. See *United States* v. *Sindel*, 53 F.3d 874, 876 (8th Cir. 1995); *In re Grand Jury Subpoenas (Anderson)*, 906 F.2d at 1488-1493. Petitioner erroneously contends (Pet. 9-10) (i) that the required disclosures of the identity of the client and the amount of the fees paid would reveal "legal advice" and (ii) that there is a conflict among the circuits as to whether the attorney-client privilege protects such "legal advice" from disclosure under Section 6050I.

The attorney-client privilege extends only to confidential communications between attorneys and their clients. *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981). The "legal advice" and "last-link" exceptions therefore can apply only to information obtained through confidential communications. See 3 J. Weinstein & M. Berger, *Weinstein's Federal Evidence* § 503.14[5][a] (J. McLaughlin ed., 2d ed. 1998). While

petitioner is correct in noting that the Second Circuit has never endorsed the "legal advice" exception (see Pet. App. 17a), the courts that do apply the "legal advice" and "last-link" rationales apply them only when disclosure of the client's identity and fee information would reveal a confidential communication. See *In re Grand Jury Subpoenas (Anderson)*, 906 F.2d at 1488-1492; *Vingelli* v. *U.S. Drug Enforcement Agency*, 992 F.2d at 452-453. As the court explained in *In re Grand Jury Subpoenas (Hirsch)*, 803 F.2d 493, 497 (9th Cir. 1986), the relevant inquiry under the "legal advice" exception is not whether the fact that a fee was paid to the attorney would implicate the client in crime but whether information concerning the fee is itself a confidential communication.[3] The decision in this case is consistent with those decisions, for it holds that the attorney-client privilege encompasses only those confidential communications necessary to obtain legal advice (Pet. App. 20a).

Moreover, even if independent vitality remained in the "legal advice" exception, petitioner does not cite any appellate decision that conflicts with the decision in this case or that adopts petitioner's broad inter-

---

[3] Attorneys have a professional obligation not to accept money from a client that constitutes the fruits of a crime or a continuing fraud. *United States* v. *Goldberger & Dubin*, 935 F.2d at 506; *In re Ryder*, 381 F.2d 713, 714 (4th Cir. 1967). If an attorney were aware that assets used to pay legal fees were derived from the very criminal acts for which representation was sought, he could not ethically accept the fees. See *In re Ryder*, 381 F.2d at 714. As the court of appeals stated in *United States* v. *Ritchie*, 15 F.3d at 601, law firms do not have a "potential monopoly on money laundering simply because their services are personal and confidential." In the present case, the district court noted that there were no facts directly linking the client's fee payments to a crime (Pet. App. 18a).

pretation of the attorney-client privilege. See Pet. 7-9 & n.3. Petitioner does seek to rely (Pet. 8-10) on the decision of the district court in *United States* v. *Gertner*, 873 F. Supp. 729 (D. Mass.), aff'd, 65 F.3d 963 (1st Cir. 1995). Contrary to petitioner's assertion (Pet. 10), however, the First Circuit did not endorse the "legal advice" exception in *Gertner*. Instead, the First Circuit expressly declined to affirm the district court on that basis. 65 F.3d at 966, 971.

The asserted conflict among the circuits thus does not exist. Moreover, the application of the attorney-client privilege has no continuing significance in this case apart from the civil tax penalty, for petitioner has now provided the required client identity and fee information to the IRS. See note 2, *supra*.[4]

2. Petitioner erroneously contends (Pet. 13-16) that the decision in this case conflicts with ethical rulings that govern the practice of law. In rejecting a similar argument, the Eighth Circuit stated in *United States* v. *Sindel*, 53 F.3d at 877, that "Congress cannot have intended to allow local rules of professional ethics to carve out fifty different privileged exemptions to the reporting requirements of 26 U.S.C. § 6050I." Accord *United States* v. *Blackman*, 72 F.3d at 1424; *United States* v. *Leventhal*, 961 F.2d at 940. In any event, as the court explained in *United*

---

[4] The scope of the attorney-client privilege is, in any event, not squarely at issue under Section 6050I. As the Second Circuit explained in *United States* v. *Goldberger & Dubin*, 935 F.2d at 505-506, even if the attorney-client privilege were technically applicable, the plain text of Section 6050I and the public policy underlying that statute take precedence and require the information to be revealed. See also *United States* v. *Leventhal*, 961 F.2d at 940-941 (agreeing with the "persuasive" reasoning of *Goldberger & Dubin*).

States v. *Monnat*, 853 F. Supp. 1301, 1309 (D. Kan. 1994), a lawyer does not act unethically by complying with statutory requirements enacted by Congress. The fact that a federal statutory scheme "is at odds with model disciplinary rules or state disciplinary codes hardly renders the federal statute invalid." *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 632-633 n.10 (1989).

Moreover, the asserted ethical dilemma posed by petitioner (Pet. 11, 13-14) is easily avoided. As several courts have noted, clients can be asked to pay in some manner other than cash. *United States* v. *Goldberger & Dubin*, 935 F.2d at 504; *United States* v. *Leventhal*, 961 F.2d at 941. As the court stated in *United States* v. *Blackman*, 72 F.3d at 1425, "[a]ttorneys should inform clients proffering cash in excess of $10,000 for fees that they will normally be obligated to disclose fee-payer identity and the nature of the fee arrangement in filing Form 8300."

3. Finally, petitioner errs in contending (Pet. 16-17) that the criminal standard of intent articulated in *Cheek* v. *United States*, 498 U.S. 192 (1991), should govern the imposition of the civil tax penalty for intentional disregard of the reporting requirements of Section 6050I. In *Cheek*, the Court was interpreting the term "willful" as applied to criminal tax offenses. 498 U.S. at 193-194. Willfulness is not an element of the civil tax penalty involved in this case. See 26 U.S.C. 6721(e).[5] The definition of criminal willfulness

---

[5] 26 U.S.C. 6721(e) imposes a civil penalty for "intentional disregard" of the reporting requirement. While a "willful" violation could result from the "intentional disregard" of the reporting requirement (see 26 C.F.R. 301.6721-1(f)(2)(ii)), the term "intentional disregard" in this statute means "only that a

applied to criminal tax statutes in *Cheek* does not apply to civil tax penalties imposed by the Internal Revenue Code. See, *e.g.*, *Hochstein* v. *United States*, 900 F.2d 543, 548 (2d Cir. 1990); *Domanus* v. *United States*, 961 F.2d 1323, 1326 (7th Cir. 1992); *Denbo* v. *United States*, 988 F.2d 1029, 1034-1035 (10th Cir. 1993).

Contrary to petitioner's contention (Pet. 18), these decisions do not conflict with *Richey* v. *United States Internal Revenue Service*, 9 F.3d 1407 (9th Cir. 1993). In *Richey*, the Ninth Circuit held that the taxpayer was collaterally estopped in his civil tax case from proving that he had not acted willfully because willfulness had already been established in his criminal conviction for preparing fraudulent tax returns. *Id.* at 1411. Moreover, the Ninth Circuit agreed with the government in *Richey* that the standard applicable to the tax negligence penalty differs from the standard for determining criminal willfulness under *Cheek*. *Id.* at 1413-1414.[6]

---

party act voluntarily in withholding requested information, rather than accidentally or unconsciously" (Pet. App. 9a).

[6] Petitioner is mistaken in asserting (Pet. 19-20) that the penalty imposed by Section 6721(e) is a "criminal punishment" under the criteria described in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963), and *Hudson* v. *United States*, 118 S. Ct. 488, 493 (1997). The Court explained in *Hudson* that whether a particular punishment is civil or criminal is "a matter of statutory construction" and that the court should first look to see if the legislature has indicated that it intended to establish a civil penalty. 118 S. Ct. at 493. Congress expressed a clear intent to establish a civil, not criminal, sanction in enacting Section 6721(e). See H.R. Rep. No. 426, 99th Cong., 1st Sess. 829 (1986); S. Rep. No. 313, 99th Cong., 2d Sess. 175 (1986); H.R. Conf. Rep. No. 841, 99th Cong., 2d Sess. Pt. 2, at 777 (1986). The monetary penalty under Section 6721(e) is not

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
LORETTA C. ARGRETT
Assistant Attorney General
CHARLES E. BROOKHART
JOHN A. DUDECK, JR.
Attorneys

MAY 1998

"so punitive in purpose and effect as to render * * * [it] criminal despite Congress' intent to the contrary." *Hudson* v. *United States*, 118 S. Ct. at 495.